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Issue Date: 09 August 2006

CASE NO. 2004-LHC-00394

OWCP NO. 02-133160

In the Matter of:

G. K.,
Claimant,

vs.

MONTAGE, INC.,
Employer/Self-Insurer,

and,

CNA INTERNATIONAL,
Insurer/Administrator

Appearances: Benjamin T. Boscolo, Esq.
For the Claimant

Roger A. Levy, Esq.
For the Employer and Carrier

Before: William Dorsey
Administrative Law Judge

DECISION AND ORDER

The Claimant brought this claim for compensation under the Defense Base Act, 42 U.S.C.A § 1651 (West 2003), an extension of the Longshore and Harbor Workers' Compensation Act ("the Act"). 33 U.S.C.A. § 901 *et seq* (West 2003). The Claimant says he injured his back, knees, left elbow and left foot, while he worked as a pipefitter/HVAC tradesperson at the United States Consulate building in Budapest, Hungary. Transcript (TR) at 18.

On July 15, 2005, a trial was held in San Francisco, California, at which the Claimant and the Employer were represented by counsel. The following exhibits were admitted into evidence:

Claimant's Exhibits ("CX") 1-11; and Employer's Exhibits ("EX") 1-6.[1] The Claimant testified on his own behalf, and Dr. Michael Hagg, Ph.D. appeared as a witness for the Employer.

STIPULATIONS

The parties stipulate and I find:

1. Jurisdiction exists under the Act.

2. An employer/employee relationship existed at the time of injury.

3. The Claimant sustained an injury to his left elbow in the course of employment on February 25, 2003.

4. The Claimant was hired by the Employer on or about January 6, 2003, and was paid through April 12, 2003 based upon an annual wage of $80,000.

5. The Claimant's industrial condition was at maximum medical improvement as of July 20, 2004.[2]

6. The Employer filed a timely application for 8(f) relief.

ISSUES

1. Whether the Claimant's employment aggravated his prior back injury and caused other injuries to his left knee and left foot.

2. The nature and extent of the Claimant's injuries.

3. The Claimant's average weekly wage.

4. Whether the Claimant is entitled to recommended medical care and reimbursement for outstanding medical bills.

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[1] The Employer included 13 exhibits attached to its pre-trial statement (hereinafter PTS EX). At trial, the Employer explained that it would submit 1) sub-exhibits to EX 6 (the application for section 8(f) relief) (hereinafter EX 6 nos. 1-5); 2) a supplemental application for 8(f) (EX 8); 3) Dr. Filbrandt's deposition (EX 14); 4) Dr. Neuman's deposition (EX 15); 5) the Claimant's deposition (EX 16); and 6) Dr. Stark's deposition (EX 17). The Claimant lodged no opposition either to the pre-trial submissions 1-13, or to any of the supplements or later depositions. Therefore, I considered all of this evidence as part of the record of this case.

[2] The Claimant's post-trial brief gives two different dates of maximum medical improvement – April 23, 2005, and July 20, 2005. There is neither an explanation, a medical report, nor any other evidence linking the Claimant's maximum medical improvement to either of those dates. It is possible that the Claimant intended July 20, 2004, the date of Dr. Stark's medical report, but mistyped 2005 rather than 2004. Therefore, I accept the Employer's representation that the parties stipulated to July 20, 2004 as the date of maximum medical improvement.

5. Whether the Claimant is entitled to interest and attorney's fees on past-due benefits, if any.

6. Whether the Employer is entitled to 8(f) relief.

FINDINGS OF FACT

Background

The Claimant is a 62-year-old man who lives in Paradise, California. On January 6, 2003, the Employer hired him to work in Budapest, Hungary. TR at 12, 14. Before he left, the Claimant expressed concern whether he would be able to work oversees because of a previous back injury. CX 9 at 145. The physician treating his back nonetheless cleared him for work, with restrictions against lifting heavy objects. TR at 21. The Claimant began the job in Budapest while taking a daily dose of Vicodin, a pain-relieving narcotic, to control painful "pinching" sensations in his back and "pricking" down his left leg that caused occasional limping. TR at 20-22.

The Claimant had some difficulty communicating with co-workers in Budapest because he spoke no Hungarian, and they spoke no English. TR at 27. On February 25, 2003,[3] he directed some employees to pull a pile of stacked sheet-metal – weighing approximately 2,600 pounds – away from a building. *Id*. The pile was on his left, but when he turned his head to the right to speak to someone, an employee to his left pulled on the sheet-metal and the pile began to fall. The Claimant heard people yelling, but he could not understand their warnings. TR at 28. When he realized his predicament the Claimant raised his arms in an effort to stop the pile's fall, but it struck him in the chest and "scraped down [his] whole body." *Id.* The Claimant "thought [he] lost both knees." *Id*. He landed on his back, covered by sheet metal from his knees to his feet. *Id*.

He had many scrapes and bruises, could not walk up the stairs to the office without help, his back and knees hurt, and both his arms "felt pretty bad." TR at 29. He went home to bed, seeking medical treatment the next day at American Clinics International in Budapest, where Dr. Eva Davos, M.D., prescribed knee braces and anti-inflammatory medication. CX 4.

Soon afterwards, the Claimant attempted to travel with his wife to Vienna, Austria, for a previously planned vacation. TR at 64. He returned early, however, and on March 13, 2003 he saw A. D. Frenyo, M.D., an orthopedic surgeon in Budapest. CX 4. Dr. Frenyo reported that the Claimant walked with an antalgic gait, that the lower, anterior part of his thighs was painful, and could see that his knees were "minimally swollen." *Id.*. Dr. Frenyo opined that the Budapest accident caused only bruises to both the Claimant's lower extremities but aggravated his back

[3] The Employer argued that the date of injury is unclear because it is listed as March 3, 2003 on an injury report. *See* EX 2. Nonetheless, I accept February 25, 2003 as the date of injury because the first medical report taken in connection to this injury is dated February 26, 2003. CX 4 at 65.

pain. *Id*. The Claimant then returned to the United States, finding the level of medical care in Hungary unsatisfactory. TR at 30-31; CX 4.

Before the Budapest accident, the Claimant had back surgery twice. The first, in 1996, was for a herniated disc. CX 4 at 67. He sustained an industrial injury to his back while working for a different employer in Hawaii in 1998. *Id*. After the Hawaii injury his low-back pain worsened, and he was disabled for several months in 1999 and 2000. CX 10 at 188.

The Claimant re-injured his back on July 15, 2002, while working for Greenway Enterprises. TR at 70. An MRI showed that he had a "ruptured disc at L3-4 migrating to L2-3." CX 4 at 73. On July 19, 2002, he had another back surgery - a partial hemilaminectomy at L2, and L3, a partial fascectomy at L3-4, and a foraminotomy at L3. CX 4. Pursuant to a workers' compensation claim against Greenway Enterprises, the Claimant received benefits for temporary total disability from mid-July 2002 until he accepted the Budapest job in January 2003. TR at 71-72, 80-81.

The Claimant has not returned to work since he left Budapest. His knees swell so that he cannot get up from a squatting position without help, and his left knee goes numb. TR at 35-37. His back constantly throbs with pain, and sometimes spasms involuntarily. TR at 35-36. His left elbow hurts and some days his fingers do not have the coordination to grip a soda can. TR at 36. He also reported trouble with balance and his foot occasionally goes numb. TR at 35.

Summary of Medical Evidence

Dr. Badour

Courtney C. Badour, D.O., a doctor of osteopathy, is the Claimant's primary care physician. CX 5. On August 19, 2002, following the Greenway injury, Dr. Badour reported that the Claimant sought treatment for an injury to his left foot. EX 6 no. 5.

On April 29, 2003, Dr. Badour diagnosed chronic back pain, exacerbated by the Budapest injury, and found that there was slightly increased left radiculopathy. TR at 31. The Claimant denied any knee problems at the time of this visit. Dr. Badour referred the Claimant to Dr. Leung, who had him previously for pain management.

On November 18, 2004, the Claimant sought treatment for pain in his right knee. CX 5 at 84. Dr. Badour diagnosed a right-knee strain. *Id*. Later in November, the Claimant heard a pop in his left knee, and on December 2, 2004, Dr. Badour diagnosed a left-knee sprain. CX 5 at 82.

Dr. Leung

Tobey M. Leung, M.D., is a physiatrist who first treated the Claimant after his Greenway injury. CX 3. On December 19, 2002, Dr. Leung conducted a Racz procedure, involving a spinal injection, to reduce the Claimant's back pain. CX 6 at 118. On July 21, 2003, following

the Budapest injury, Dr. Leung noted that the Claimant was doing "relatively well" with low-dose methadone for pain management, but that he was not fit for work. CX 3 at 61.

On March 15, 2005, the Claimant reported to Dr. Leung that his low back and lower extremity pain was getting worse. CX 3 at 58.1. Again, Dr. Leung found that the Claimant was not fit for work. CX 3 at 58.2.

Dr. Azavedo

On November 18, 2003, the Claimant saw Alan J. Azevedo, M.D., an orthopedic surgeon, for treatment of his left elbow. CX 2 at 50. Dr. Azevedo concluded that the Claimant had left ulnar nerve neuropathy with moderate to severe involvement of the ulnar nerve. *Id*. On January 14, 2004, Dr. Azavedo performed a left ulnar nerve submuscular transposition procedure to alleviate the Claimant's elbow pain. *Id.* at 40. Following the surgery, the Claimant still suffered from ulnar nerve palsy. *Id.* at 27. He sought a second opinion from Leonard J. Brazil, M.D., who recommended tendon transfers to improve the function of his hand, and re-exploration of the ulnar nerve to ensure it had been completely decompressed. *Id.* at 25.

Dr. Philip Filbrandt

Philip Filbrandt, M.D., is a physiatrist who treated the Claimant from January of 2002 through November of 2004. CX 10 at 184. In his January 18, 2002 report, Dr. Filbrandt diagnosed persistent low back pain with neurological signs including left lower extremity weakness. CX 10 at 185. On August 29, 2002, following the Greenway injury, Dr. Filbrandt found that the Claimant's condition was worse, and that his leg was giving out. CX 10 at 190.

On March 29, 2003, Dr. Filbrandt diagnosed the Claimant with chronic pain that had been exacerbated by the Budapest injury, and with slightly increased left-leg radiculopathy. CX 1 at 21.

On June 9, 2003, Dr. Filbrant reported that the Claimant presented with pain and stiffness in his elbows, knees, back and wrists. CX 1 at 14. His physical activities had diminished significantly because of his back pain, he had lost some weight, and he had increasing difficulty sleeping. *Id*. Although Dr. Filbrandt remarked that the Claimant's back was not "dramatically different" from December of 2002, he explained that the Claimant had suffered additional injury, yet flare-ups are to be expected when a patient has multiple back surgeries and an ongoing condition. CX 10 at 196. Dr. Filbrandt further testified that he had "no reason to doubt" that the Claimant's elbow, knee, and foot conditions were caused by the Budapest injury. CX 10 at 210.

On July 10, 2003, Dr. Filbrandt determined from an x-ray that the Claimant had fractured his left foot, which would need surgery. *Id*. at 13. Over the course of four examinations between July 7 and August 13, 2003, he found that the Claimant's knee symptoms were improving, but that his left upper extremity symptoms were "clearly worse." *Id.* 6-9. When Dr. Filbrandt last saw the Claimant on November 2, 2004, he opined that the Claimant's back condition had improved since 2002 in terms of increased mobility and better pain control. CX 10 at 206-07.

Dr. Stark

On July 20, 2004, the Claimant was evaluated by James B. Stark, M.D., a physiatrist, at the Employer's request. CX 9 at 139. Dr. Stark reviewed x-rays of the Claimant's left arm, taken on June 24, 2003, and found that there was a "possible bony injury with sclerosis in the radial head" of the left elbow, suggestive of a recent injury. *Id*. Dr. Stark testified that the Claimant's elbow injury was the direct result of the Budapest accident because there were no prior symptoms of left ulnar nerve compromise. CX 9 at 154. Dr. Stark found the Claimant unable to perform heavy lifting, forceful gripping, torquing, and other strenuous activities with his left arm. CX 9 at 174.

Dr. Stark diagnosed bilateral multi-compartmental osteoarthritis in the Claimant's knees. CX 9 at 151-52. He explained that this condition pre-existed the Budapest injury, but that the "record is a little sketchy" whether this condition was aggravated by the injury. *Id.* Although he testified by deposition that he thought the Claimant was embellishing his symptoms because the sensory loss in his left leg "was anatomically not explainable," he nonetheless gave the Claimant the benefit of the doubt. CX 9 at 149. Dr. Stark concluded that the Budapest injury aggravated the pre-existing problem because there were no complaints of knee pain beforehand. CX 9 at 152. Dr. Stark found that this injury reduced the Claimant's capacity for standing by 25%, and that it precluded him from walking for periods of more than 20 minutes, and from kneeling, squatting, repetitive or continuous climbing, and from heaving lifting.

Dr. Stark found that the Claimant's foot was symptomatic before the Budapest injury because the Claimant limped beforehand. CX 9 at 174. Yet the Claimant told him that the limping could have been due to the lower back problem or because of the bunion and hammertoe deformities. *Id.* He concluded that there was no change in the Claimant's left foot after the Budapest injury. *Id.*

The Claimant told Dr. Stark that after the Greenway injury, he "really should not have gone back to work." *Id.* at 165. Dr. Stark explained that there are no objective factors linking the Claimant's current back disability with the Budapest injury, but there has been subjective worsening of the Claimant's spine condition. *Id.* at 176. He found that the Claimant had reached maximum medical improvement by the time of his evaluation on July 20, 2004. *Id*. at 151. He concluded that the Claimant's lower back condition limits his employability to light work. *Id.* at 174.

Dr. Cummings

On April 4, 2004, Brock S. Cummings, M.D., an orthopedic surgeon, evaluated the Claimant's knee. CX 7. Dr. Cummings found that the Claimant had improved, but that some symptoms had plateaued and then became progressively more painful; he diagnosed bilateral knee pain secondary to osteoarthritis. *Id.* Dr. Cummings opined that it was not clear whether these symptoms resulted from the Budapest injury, but the Claimant was asymptomatic before that. *Id.* He considered it "feasible that [the Claimant] was developing degenerative changes that were subclinical, but this clearly would be accelerated because of his injury." *Id.*

Dr. Neuman

On June 27, 2003, the Claimant saw Lance E. Neuman, a doctor of podiatric medicine, for pain in his left foot. CX 8. The Claimant told Dr. Neuman that his foot never hurt until the Budapest injury. *Id.* Dr. Neuman testified that the Claimant had a bunion and hammertoe for many years prior to the Budapest injury. CX 11 at 227. An x-ray revealed several bone fragments in the Claimant's left foot that were consistent with traumatic injury, but Dr. Neuman could not determine whether it was caused by some sort of industrial injury or a stubbing. CX 11 at 242. He also could not determine how long the bone fragments had been there. CX 11 at 229-30. Dr. Neuman opined that some of the Claimant's foot deformity is congenital, but not all of it is, given the presence of the bone fragments. CX 8 at 133. On September 5, 2003, he performed three surgical procedures on the Claimant's left foot, all designed to relieve the effects of the bunion and hammertoe. CX 11 at 237.

CONCLUSIONS OF LAW

The Act is construed liberally in favor of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vizzolo, Inc., v. Britton*, 377 F.2d 133 (D.C. Cir. 1967). A judge may evaluate credibility, weigh the evidence, draw inferences, and need not accept the opinion of any particular medical or other expert witness. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. & Hartford Accident & Indem. Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981).

If an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, then the entire resultant disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). The Claimant alleges four different injuries: 1) left elbow 2) back; 3) left knee; and 4) left foot.[4] The Employer concedes liability for the left elbow, but argues that the Claimant sustained a temporary aggravation of his pre-existing back, knee and foot conditions that each have returned to their pre-injury status.

Statutory Presumption

Section 20(a) of the Act creates an initial, rebuttable presumption that a claimant's disabling condition is casually related to his employment. 33 U.S.C.A §920(a) (West 2003); *see also Ramey v. Stevedoring Services of Amer.,* 134 F.3d 954, 959 (9th Cir. 1998). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. A claimant need only prove that 1) he sustained a harm or pain; and 2) an accident occurred in the course of employment, or conditions existed at work, that could have caused the harm or pain. *Kier v Bethlehem Steel Corp*., 16 BRBS 128 (1984). Once he does, it is presumed that the injury arose out of the claimant's employment.

[4] In its post-trial brief, the Employer includes discussion of an injury to the Claimant's hand. The Claimant did not include a hand or wrist injury in either his pre- or post-trial statement. Therefore, I have not considered an injury to the Claimant's hand or wrist, if any, as part of this claim for benefits.

An employer may overcome the presumption with specific and comprehensive medical evidence that severs the presumed causal connection between the injury and the claimant's employment. *Brown v. Jacksonville Shipyards, Inc.,* 893 F.2d 294 (11th Cir. 1990); *Swinton v. J. Frank Kelly, Inc.,* 554 F.2d 1075, 1082-1083 (D.C. Cir. 1976), 4 BRBS 466, 475; *Damiano v. Global Terminal & Container Serv.,* 32 BRBS 261, 262-263 (1998). The employer must present substantial, countervailing evidence to carry its burden of proof. *Swinton*, *supra,* 554 F.2d at 1082. Where a claimant alleges an aggravation of a pre-exiting injury, the employer must establish that the claimant's condition was not caused or aggravated by his employment. *Rajotte v. General Dynamics Corp*., 18 BRBS 85 (1986). If the employer meets its burden, then the presumption falls out of the case and the issue of causation is resolved by evaluating the evidence as a whole. *Devine v. Atlantic Container Lines,* 25 BRBS 15, 21 (1991).

The Claimant's evidence is sufficient to invoke the Section 20(a) presumption that his prior back injury was aggravated by the Budapest injury with the reports from Drs. Badour, Filbrandt, and Stark. It is also presumed that the left knee and foot injuries were caused by this accident based on the reports of Drs. Neuman, and Cummings. Being pinned beneath a 2,600-pound pile of sheet metal could have caused his injuries. The burden to rebut the presumption shifts to the Employer.

Back

The Employer relies upon Dr. Filbrandt's testimony that details the Claimant's prior back injuries. It emphasizes that this physician found that the Claimant's back was not "dramatically different" in June of 2003 than it had been in December 2002. Dr. Filbrandt also thought that the Claimant's back was better in November 2004 than it had been in 2002, giving an impression that the Claimant had returned to pre-injury status. CX 10 at 206.

Although the Claimant suffered from significant back injuries before working in Budapest, Dr. Filbrandt's opinion that the back condition was not "dramatically different" is tempered by his testimony that the Budapest injury had aggravated his previous condition. CX 10 at 210. Dr. Filbrandt further explained that he was not focusing on the back because the Claimant was also under Dr. Leung's care for that condition. CX 10 at 195. When asked for objective signs of the Claimant's improvement, Dr. Filbrandt explained that the Claimant's mobility is better, due in part to the fact he has become "relatively inactive" – avoiding bending, twisting, and lifting – and that his pain was "generally better controlled." CX 10 at 206-207.

The Claimant has learned to manage his pain. This does not demonstrate that the injury that was the source of the pain has healed or improved, it suggests an adaptation that he did not need to make before. Dr. Filbrandt's reports and testimony do not present substantial evidence that the Claimant has returned to pre-injury status. The Employer failed to rebut the presumed causal connection between the Budapest injury and the Claimant's current back condition. Even if the presumption were to drop from the case, the evidence on the causation issue when viewed as a whole weighs in the Claimant's favor.

The Claimant testified that his back problems were intermittent before the Budapest injury, but now he experiences a constant throbbing. TR at 20. Dr. Stark, the Employer's

expert, testified that "this is one of those cases in which it can be stated with absolute certainty that the Claimant's lower back condition is far worse now than it would be as a result of the subject injury because of the combined pre-existing spine problems." CX 9 at 174. The Claimant used to be able to work for eight hours while standing, but no longer can. *Id.* at 148. He also needs more narcotic pain medication. *Id*. I find that the Claimant's current back condition was caused by the Budapest injury.

Knee

The Employer again relies on the testimony of Dr. Filbrant, who diagnosed osteoarthritis of the left knee, although he also reported that the Claimant suffered a traumatic knee injury. CX 10 at 202-03. Dr. Filbrandt explained that surgery for this knee was not considered because, over time, "the situation there seemed to quiet down." CX 10 at 203. This proof of pre-existing osteoarthritis is not enough to break the casual chain because the knee condition could not have "quieted down" if it had not first "flared up" from the Budapest injury.

The evidence as a whole further supports this conclusion. The Claimant testified that he did not have knee pain "on a regular basis" before he went to Budapest. TR at 22. Although he admitted that his knees hurt sometimes while he did heavy work, he had not seen a doctor for the disturbance. *Id.* After the Budapest injury, the Claimant continued to have trouble with his left knee through December of 2004. Dr. Cummings concluded that the Claimant's knee problems could not be separated from the Budapest injury and blamed on a pre-existing condition. CX 7. I find that the Budapest injury aggravated the Claimant's knee condition.

Foot

The Employer insists that the Claimant's foot condition pre-existed the Budapest injury. Dr. Stark reviewed the medical reports about the Claimant's left foot and determined that the Budapest incident neither caused a new foot injury nor aggravated an existing one. CX 9 at 154. The Employer relies on Dr. Stark's opinion, as well as medical records from 2002 that show that the Claimant sought treatment for the second toe of his left foot. EX 6 supp. 1. Here, the Employer presents substantial evidence that rebuts the causal link between the Claimant's foot problems and the Budapest injury. The presumption falls out of the case and causation must therefore be determined by the evidence as a whole.

On August 16, 2002, the Claimant sought treatment from Dr. Badour for a lesion on the second toe of his left foot. *Id*. X-rays taken of the left foot on August 16, 2002, were normal. CX 9 at 174. Dr. Badour ruled out the possibility of trauma, eventually diagnosing cellulitis, which improved with antibiotics. EX 6 supp. 1. Dr. Badour's medical report contradicts the Claimant's testimony that he had no problems with his foot before working in Budapest. TR at 23. The Claimant told Dr. Neuman that he had had a bunion and hammertoe for years, but that they had been asymptomatic. *Id* at 227. Dr. Stark, however, found that the Claimant's foot was symptomatic before the Budapest injury because the Claimant told him that he limped. CX 9 at 174.

On June 27, 2003, Dr. Neuman found bone fragments in the second toe of the Claimant's left foot, but he could not determine how long the fragments had been there. CX 11 at 228, 242. Dr. Neuman explained that the bone fragments found in the Claimant's second toe were separate from the bunion and hammertoe, yet he concluded that the Claimant's pre-existing foot condition "could well have been aggravated" by the Budapest injury. *Id.* at 232. Although Dr. Neuman could not determine what caused the bone in the Claimant's toe to break, it is undisputed that when 2,600 pounds of sheet metal collapsed into the Claimant, it landed on his feet. Without any confirmation that the bone fragments were present before this incident, I conclude that it is more probable than not that the Budapest injury aggravated the Claimant's previous foot condition.

Nature and Extent of the Disability

The Claimant has the initial burden to establish the nature and extent of his disability. *Trask v. Lockheed Shipbuilding and Construction Co.,* 17 BRBS 56 (Feb. 14, 1985). A disability is temporary until the Claimant reaches maximum medical improvement (MMI). *James v. Pate Stevedoring Co.,* 22 BRBS 271, 274 (1989). The parties stipulate to a date of June 20, 2004 as the date of MMI, based on Dr. Stark's medical report.[5] I find that the Claimant was temporarily disabled from February 25, 2003 until July 19, 2004, and has been permanently disabled from July 20, 2004 to the present and continuing.

Total disability is the complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a *prima facie* case of total disability, the claimant must show that he is unable to perform his usual employment due to his work-related injury. *See Elliott v. C & P Telephone Co*., 16 BRBS 89 (1984); *Williams v. Halter Marine Service, Inc.,* 19 BRBS 248, 252 (1987). If he does, the burden shifts to employer to establish that suitable alternate employment is available. *Williams,* 19 BRBS at 253.

The Claimant has not earned any wages since the Budapest injury.[6] He testified that he is unable to return to his job, and that approximately 5 out of 7 days-a-week he is incapacitated by pain, an inability to concentrate, and by the medication he takes for depression. TR at 40-1. Dr. Leung, the Claimant's treating physician for his back injury, reported on March 15, July 21, and June 9, 2003, that the Claimant was "not fit for work." CX 3. Dr. Stark testified that by July 20, 2004, the Claimant's employability would be limited to a job "with a minimal demand for physical effort . . . meaning sit and stand at will, no lifting, pushing, [or] pulling." CX 9 at 147. Likewise, Dr. Filbrandt conceded that *if he had to list work restrictions*, then he would recommend limited bending, twisting, and lifting only occasionally, up to 20 pounds. CX 10 at 211. Although Drs. Stark and Filbrandt opined that the Claimant is available for some work, at this stage the Claimant need only show that he is unable to perform his usual employment. *Elliot v. C & P Tel. Co*., 16 BRBS 89 (1984); *Manigault v. Stevens Shipping Co.,* 22 BRBS 332 (1989). The limitations listed by Drs. Stark and Filbrandt prevent the Claimant from returning to his job as a HVAC tradesman. Therefore, he satisfies his *prima facie* case of total disability.

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[5] *See* footnote 2.

[6] Although the Claimant was injured on February 25, 2003, the Employer continued to pay him until April 12, 2003. EX 2. The Claimant explained that he did very light work for the Employer during this time. *Id*.

To rebut the presumption of total disability, the Employer must present evidence of suitable alternative employment that the Claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir 1981). To meet this burden, the Employer must show job opportunities available in the geographical area where the claimant resides, that he could perform given his age, education, work experience, and physical restrictions, and for which the Claimant can compete. *Id*. at 1042-43; *Bumble Bee Seafoods v. Director, O.W.C.P*., 629 F.2d 1327 (9th Cir. 1980); *Hansen v. Container Stevedoring Co*., 31 BRBS 155, 159 n.5 (1997). The reports of vocational counselors that specify job openings may be used to establish suitable employment. *See Turney v. Bethlehem Steel Corp.,* 17 BRBS 232 (1985).

On February 8, 2005, the Claimant submitted to a vocational consultation by Michael Haag, Ph.D., CRC, a vocational consultant. Dr. Hagg testified that he considered the Claimant's exertional and non-exertional limitations, such as a significant amount of narcotic medication that impacts the Claimant's ability to concentrate, drive, work around machinery, or at heights. TR at 99. He also considered that the Claimant limps, and that he should neither lift over 10 to 15 pounds, nor repeatedly bend or stoop. *Id*. Dr. Haag prepared a report that identified the following types of part-time, sedentary work he believed the Claimant could perform:

1. Part time telemarketer
2. Telephone recruiter
3. Unarmed security guard
4. Part-time cashier

TR at 89-90; PTS EX 13.

The Claimant explained that on a good day, he could perform the jobs listed in Dr. Hagg's report. TR at 45. He has few good days, however (2 out of 7 days-a-week). TR at 40. On a bad day, he experiences persistent back pain and throbbing leg pain that causes him to spend five to seven hours in his recliner, dozing on and off. *Id*. He claims that he is unable to watch television or read for more than a couple of minutes at a time because he cannot concentrate. TR at 41.

Because a majority of his days are not good, the Claimant concluded that he could not do the jobs Dr. Hagg identified. TR at 46. He believed he could not do the telemarketing or recruiting jobs because the combination of pain and medication stymies his concentration to the extent that he could not remember information like the caller's name. *Id*. He testified he could not perform the security guard position because he might lose his balance if he were standing, and if sitting, he could not concentrate on the television monitors. TR 46-7. Finally, he explained he could not be a cashier because he cannot stand that long, and because of his pain he could not deal with the public. TR at 46. Despite his insistence that he could not do any of these jobs, the Claimant had applied to "help out" with the local sheriff's association. TR at 43. The record is silent about what it means to help out, or whether this would be a volunteer position, although that seems likely.

Dr. Hagg thought that on the Claimant's bad days, he could still work up to four hours a day, even if he were dozing on and off for the other five to seven hours. TR at 87-9. Yet he conceded that the Claimant could not do any of the jobs identified when his cognitive abilities were compromised due to pain or medication, such that he could not concentrate for more than a few minutes. *Id*. Dr. Stark further qualified the Claimant's ability, explaining that the pain medication would effect his concentration, and diminished concentration with pain would diminish the Claimant's employability. CX 9 at 157-59.

Problems with productivity, persistence and pace would make it impossible for the Claimant to be employed in the competitive labor market for wages. Although the Claimant might be capable of working up to four hours a day, he does not have enough control of his pain to know which four hours will be productive, and whether that time will be consistent from day to day. He might feel well for two hours in the morning, one hour in the afternoon, and then one hour again at night. The next day, it could be entirely different, which hinders his ability to schedule time to work. Further, both the vocational expert and Dr. Stark doubted that the Claimant could work the jobs identified by the Employer if his concentration were so diminished that he could not even watch television or read for more than ten minutes.

The Claimant's application with the sheriff's department to do some volunteer work undercuts his testimony about his limitations to some extent, but not enough is known about this position to compare it to the part-time jobs listed in Dr. Haag's report. I have no idea what responsibilities, if any, are involved in working for the sheriff's association, which would give insight into the level of concentration required, or the frequency or flexibility of the work. This is a matter on which the Employer had the burden of proof, and it failed to carry its burden. Helping the sheriff's association could look like part time employment of twenty hours of involvement per week or casual and intermittent assistance offered for one to two hours per month. It could be unscheduled time so the Claimant could go when he feels well, leave when he does not, or simply not come in if he is having one of his bad days.

Based primarily on how doubtful it is that the Claimant's could 1) reliably attend a job shift he had been scheduled for, or 2) concentrate at work when medicated and/or in pain, I find that the Employer has not met its burden of proving suitable, alternative employment.

Average Weekly Wage

The Claimant's average weekly wage must be determined under one of the three alternative standards set forth in subsections 10(a) (b) and (c) of the Act. 33 U.S.C.A. § 910 (West 2003). Section 10(a) applies when a claimant worked in the same employment for "substantially the whole of the year" immediately preceding the injury. *Id.* Section 10(b) applies when the claimant was not employed substantially the whole year preceding the injury, but there is evidence in the record of wages of a similarly situated employee who did work substantially the whole year. *Id.* Section 10(c) applies when neither (a) or (b) can be reasonably or fairly applied. *Id.* The Claimant was employed under a contract with the Employer for $80,000 a year, but he worked only for six weeks. PTS EX 11. He proposed an average weekly

wage in his pre-trial statement of $1,000, but he provided no evidence to support this figure.[7] The Employer calculates an average weekly wage of $1,200, based on section 10(c).

Section 10(a) is not appropriate in this case because the Claimant worked such a short time in 2003; he worked only five months (February 25, through July 15, 2002) during the year immediately preceding the injury. The parties present no evidence of a similarly situated employee who worked substantially the whole year, so section 10(b) is likewise inapplicable. The Claimant's average weekly wage must be calculated pursuant to section 10(c).

Under the language of section 10(c) at least three factors must be considered: 1) the previous earnings of the claimant in the job he performed when he was injured; 2) the previous earnings of others engaged in similar employment, and 3) any other employment of the injured employee, including self employment. 33 U.S.C.A. § 910(c) (West 2003). Since the underlying purpose of section 10(c) is to assess a claimant's actual earning capacity, it is also appropriate to consider other factors, such as an employee's "ability, willingness and opportunity to work." *Tri-State Terminals, Inc., v. Jesse*, 596 F.2d 752, 757 (7th Cir. 1979); *Palacios v. Campbell Industries*, 633 F.2d 840, 843 (9th Cir. 1980).

The Claimant's actual earnings while employed by Greenway in the year prior to the date of injury in 2002 were $17,010.00, based on a daily rate of $240. PTS EX 11 at 42-3. Although he did not work from July through December 2002, extending his wages over the remainder of the year yields an average weekly wage of $1,200 [($240 * 260)/52 = $1,200], and a corresponding compensation rate of $800. While the Claimant worked in Budapest, he earned a biweekly rate of $2,841.53; he contracted for an annual salary of $80,000, which breaks down to $1,538.46 per week. PTS EX 11 at 38, 41. The parties submitted no further evidence of earnings. Based on the Claimant's lack of willingness and ability to work, the short tenure of his employment in Budapest, and no objection to the Employer's proposal of $1,200, I find that $1,200 is a fair and reasonable calculation of the Claimant's actual wage earning capacity.

Medical Care

The Act requires an employer to furnish all medical benefits that the nature of the injury or the process of recovery requires. *See* 33 U.S.C. § 907. A claimant establishes a *prima facie* case for compensable care when a physician describes the care as necessary for a work-related condition. *Turner v. The Chesapeake and Potomac Telephone Company*, 16 BRBS 255 (1984). Dr. Stark reported that future treatment for the Claimant's lower back has been recommended following prior injuries, and that the Claimant would require ongoing treatment for his lower back after the Budapest injury. CX 9 at 175. Ongoing treatment for the Claimant's back is necessary, under Dr. Stark's report, and the Employer bears the obligation to provide these medical benefits.

Although a dispute over a medical bill related to the Claimant's foot surgery was raised during the hearing, no proof of medical expenses was submitted. TR at 7. Therefore, I can make

[7] It is completely unclear how the Claimant arrived at this amount. Simply dividing $80,000/52 weeks yields a weekly wage of $1,538.46.

no determination of reimbursement of any specific charges, but find the Employer liable for the foot surgery.

Interest

The Claimant is entitled to interest on his disability award to make him whole for the delay in payment. *Foundation Constructors, Inc. v. Director, O.W.C.P.*, 950 F.2d 621, 625 (9th Cir. 1991). Interest begins to run 14 days after the claim is filed. *Wilkerson v. Ingalls Shipbuilding, Inc*., 125 F.3d 904, 908 (5th Cir. 1997). Here, the claim for compensation is not dated, but a date stamp at the top of the claim form indicates that the claim was faxed to the Department of Labor, O.W.C.P., on May 7, 2003. EX 2. The Employer asserts it did not know of the injury until April 29, 2003. EX 3. The Claimant testified that he reported his injury on the day it occurred to the project manager at the work site. TR at 29-30. He also claims that he notified the Employer's United States office by e-mail a day or two after the accident. TR at 30, 62. The LS-202, dated April 21, 2003, reports that the Employer or foreman knew of the accident on March 10, 2003. EX 1. Therefore I find that there was adequate notice of the injury, but without a dated claim form I cannot fix a date sooner than 14 days after the form was faxed to the O.W.C.P.[8] Therefore, I find that interest began to accrue on May 21, 2003, and is payable at the statutory rate. 28 U.S.C. § 1961.

The Claimant's disability benefits are payable from the date his loss became permanent. *Howard v. Ingalls Shipbuilding, Inc*., 25 BRBS 192 (1991). I find the Claimant's disability became permanent and his benefits came due on July 20, 2004.

8(f) Relief

On November 7, 2003, the Employer notified the O.W.C.P. of its intent to file for section 8(f) relief when the Claimant reached maximum medical improvement. EX 4. It filed its first application on November 25, 2003, which was denied on December 2, 2003. EX 6; PTS EX 7. It then filed a supplemental application on September 8, 2004, and on November 12, 2004, the Director wrote to advise that no position was taken on this matter. PTS EX 9.

Section 8(f) of the Act shifts part of the liability for permanent total disability from the employer to the Special Fund, established in Section 44 of the Act, when the ultimate disability is not due solely to the injury that is the subject of the claim. 33 U.S.C. § 908(f). To qualify for section 8(f) relief in the event of an ultimate permanent total disability, an employer must make a three-part showing that: 1) the employee had a pre-existing partial disability; 2) this partial disability was manifest to the employer; and 3) it rendered the second injury more serious than it otherwise would have been. *Director, O.W.C.P. v. Berkstresser*, 921 F.2d 306, 309, 24 BRBS 69 (CRT) (D.C. Cir. 1990).

Pre-existing Partial Disability

[8] The Employer bears the burden of showing by substantial evidence that it has been unable to investigate effectively some aspect of the claim because of untimely notice. *Bukovi v. Albina Engine/Dillingham, et al*., 22 BRBS 98 (1988). Despite a missing date on the claim form, I find that the claim was timely noticed and filed because the Employer has not shown that any late filing or notice disrupted the defense of this claim.

To qualify for section 8(f) relief, the claimant's pre-existing disability needs not be economically disabling or require ongoing medical treatment. It is enough that the pre-existing condition would motivate a cautious employer to discharge or refrain from hiring the employee "because of a greatly increased risk of employment-related accident and compensation liability." *See C&P Telephone Co. v. Director, O.W.C.P.*, 564 F.2d 503, 513, 6 BRBS 399 (D.C. Cir. 1977). A previous injury in isolation is not enough; the injury must be accompanied by a "serious, lasting physical problem" to qualify as a pre-existing medical condition under 8(f). *Director, O.W.C.P. v. Belcher Erectors*, 770 F.2d 1220, 1222, 17 BRBS 146 (CRT) (D.C. Cir. 1985). The Employer seeks 8(f) relief based on the Claimant's prior history of occupational injuries and orthopedic surgeries.

The Claimant had significant back problems, including degenerative disc disease diagnosed in 1999, as confirmed by various medical records from his primary care physician, pain specialists, and surgeons. EX 6 no. 1. He had back surgery twice (first in 1996 and again in 2002), and was taking prescription pain medication for back pain when he began working for Employer. *Id*. There are additional medical records documenting the Claimant's knee and foot difficulties before to the Budapest injury. Based on that medical history, I find that the Claimant had a pre-existing partial disability.

Partial Disability Manifest to the Employer

A pre-existing disability meets the manifest requirement of section 8(f) if before the injury at issue, the employer had actual knowledge of the pre-existing condition. *Esposito v. Bay Container Repair Co.*, 30 BRBS 67, 68 (1996); *Wiggins v. Newport Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997). Constructive knowledge also satisfies this requirement; it can be established from medical records in existence at the time of the new injury from which the earlier condition may be objectively determined. *Director, O.W.C.P. v. Universal Terminal & Stevedoring (De Nichilo)*, 575 F.2d 452, 454-57, 8 BRBS 498 (3rd Cir. 1978).

The Employer contends, and I agree, that medical records existed at the time of the Budapest injury that gave at least constructive notice of Claimant's pre-existing medical conditions.

Most Recent Injury is not Sole Cause of Disability

To satisfy the contribution element, the employer must show that the pre-existing impairment contributed to the total disability; it is not enough that an additional injury makes the total disability even greater. *E.P. Paup Co. v. Director, O.W.C.P.*, 999 F.2d 1341, 27 BRBS 41 (CRT) (9th Cir. 1993); *see also C&P Tel. Co., supra,* 564 F.2d at 514-51 (granting 8(f) upon reasoning that it was "highly improbable" that the relatively minor, second injury alone would have resulted in permanent, total disability). An employer can establish the contribution of the earlier injury with "medical or *other* evidence." *Sproull v. Director, O.W.C.P.*, 86 F.3d 895, 900 (9th Cir. 1996). Here, the medical records documenting back, knee and foot problems, including two surgeries, establish the pre-existing injuries. The Claimant suffered a new injury to his elbow, and the record contains medical evidence and opinion that the Budapest injury exacerbated the previous injuries, thereby increasing the Claimant's need for pain medication

and foot surgery. Dr. Stark opined that the Claimant's lower back condition is far worse because of his pre-existing back injuries.

What the evidence fails to show is that the pre-existing conditions plus the Budapest injury resulted in total disability. In other words, the Budapest injury alone could have caused the total disability the Claimant now suffers. Proof of injuries made worse does not discount the possibility that the Budapest injury was severe enough, by itself, to permanently and totally disable the Claimant. Without more I cannot find that the Employer has satisfied its burden to prove that the Claimant's pre-existing impairment contributed to his total disability. Therefore, the Employer's request for Special Fund relief is denied.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and on the entire record, I issue the following compensation order. The specific dollar computations may be administratively calculated by the District Director.

It is therefore **ORDERED**:

1. The Employer shall pay the Claimant compensation for temporary total disability from February 25, 2003 to July 19, 2004, based on an average weekly wage of $1,200.

2. The Employer shall pay the Claimant compensation for permanent total disability from July 20, 2004 to the present and continuing based on an average weekly wage of $1,200. This rate of compensation shall be adjusted annually to reflect the rise in the national average weekly wage, pursuant to 33 U.S.C. § 910(f).

3. The Employer shall furnish all medical benefits related to the Claimant's elbow, back, knee and foot injuries.

4. The Employer shall pay interest on the Claimant's unpaid compensation benefits from May 21, 2003, at the rate prescribed under the provisions of 28 U.S.C.A § 1961 (West 2003).

5. The Employer's request for Special Fund relief is denied.

6. The Claimant's counsel has 20 days from the receipt of this Decision and Order to submit an affidavit of fees and costs; the Employer has a like time to file objections to it. Within 10 days Claimant's counsel may file a reply. Within one week Claimant's counsel shall arrange an in-person meeting with the Employer's counsel, to attempt to resolve all objections, and file a report on those resolved and those that remain within one week of their meeting.

7. All computation of benefits and other calculations, which must be made to carry out this Order, are subject to verification and adjustment by the District Director.

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William Dorsey
Administrative Law Judge